IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 716

DOMINICK ABBRESCIA,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Dominick Abbrescia, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on January 11, 1962.

JUDGMENT AND OPINION OF COURT BELOW.

The Judgment of the District Court for the Northern District of Illinois was entered on April 1, 1960, sentencing the defendant to imprisonment for ten years. The case is not yet reported, but appears at p. 175 of the Appendix certified to this Court by the Clerk of the Court of Appeals.

The Opinion of the Court of Appeals for the Seventh Circuit affirming said judgment was filed January 11, 1962. It appears in the Appendix hereto and in the certified copy of the Record. The Opinion is not yet reported.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. Code 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. May the Court of Appeals ignore this Court's holdings in the recent cases of *Elkins* v. *United States*, 364 U.S. 206 and *Rios* v. *United States*, 364 U.S. 253, where evidence was introduced in the trial which was illegally seized by a state officer and where the trial court adopted the theory and argument of the government prosecutor that even if there were an illegal search by state officers it did not affect the legality of the presentation of the evidence on behalf of the federal government in a federal prosecution?.

2. May a judgment of conviction and a sentence of ten years imprisonment stand where the Court of Appeals in its Opinion stated that there was " . . . no showing that it (the evidence) was not seized in a search incidental to a lawful arrest", where it was admitted during the federal trial that in a state proceeding the evidence in question was suppressed on the grounds of an illegal search

by state officers and where in the federal trial the prosecutor had assumed that irrespective of the illegality of the state search that the overturned "silver platter" doctrine still applied?

3. Was the defendant deprived of his right to a fair trial as guaranteed by the Fourteenth Amendment to the Constitution when the jury was permitted to view the reverse side of his fingerprint card, which carried information from which the jury could improperly infer that he was wanted by the FBI for certain crimes unrelated to the indictment and from which the jury could improperly infer either that he was on probation for an offense or that he was going to be placed on probation for the instant offense—none of which information was true?

4. Can a defendant receive a fair trial in accordance with the standards of criminal justice as laid down by this Court when many of the exhibits were improperly numbered, when some of the exhibits were changed after the introduction of them into evidence so that they might conform to certain counts, and when there were duplicate numbering of exhibits without identification to which particular counts the exhibits applied?

5. May a conviction be sustained when there is a failure by the trial court to instruct the jury on essential elements of the case in connection with the counts charging interstate transportation of checks; and does not the trial court's failure to do so deprive the defendant of a fair trial in accordance with the standards of criminal procedure in a federal case?

6. Where the petitioner was convicted on a number of counts for which he received a sentence of five years, which five years was made to run consecutive to a five year

sentence he received on earlier counts, where the government did not show any personal participation by the defendant, and where the government did not ask the court to instruct the jury as to a conspiracy theory or as to an aider or abettor theory as to those counts, may such conviction stand when the defendant is charged as a principal and the evidence is lacking as to his participation as a principal and where the jury is left without any instruction as to the basic issue?

7. Where the Court of Appeals has misapprehended the contentions of the defendant and the State of the record on the questions presented, and where the Court of Appeals has failed to rule on some of the questions presented in the brief filed thereby the petitioner, should not this Court exercise its jurisdiction to prevent an injustice where the defendant was effectively denied his right to have an appellate court consider the legal points he raised for consideration?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Fourteenth Amendment to the Constitution of the United States.

2. Section 1341, Title 18, United States Code.

3. Section 2314, Title 18, United States Code.

The pertinent provisions appear in the Appendix hereto.

STATEMENT OF THE CASE.

Dominick Abbrescia and others were convicted after a trial to a jury. He was indicted with other defendants, David Doran, Joseph Grieco, Abeck Harris, Nate Schulman, Amedeo DiDomenico, Joseph A. LoCelso, and James T. Korbos in a 40 count indictment charging in the first 6 counts the use of the mails in pursuance of a scheme to defraud in violation of Section 1341, Title 18, United States Code and in counts 7 through 40 the transporting in interstate commerce of either falsely altered or forged checks in violation of Section 2341, Title 18, United States Code.

Abbrescia was convicted in Counts 1, 2 and 6 of the mail fraud counts and in Counts 9, 10, 18, 19, 20, 33, 39 and 40 of the interstate transportation counts.

He was sentenced to five years each on Counts 1, 2 and 6, the sentences to run concurrent; and five years on each of the remaining 8 counts of the indictment, the sentences to run concurrent with each other, but consecutive to the sentence imposed on Counts 1, 2 and 6, making a total of ten years altogether (A. 175). The Court also "ordered that the defendant shall be eligible for parole upon serving two years of the sentence imposed." (A. 175).

(Doran was sentenced to 25 years; Grieco was sentenced to fifteen years; LoCelso to two years; DiDomenico, two years; Harris, two years; and Schulman, one year. Grieco, Doran and LoCelso have filed their separate appeals).

The errors relied on relate to the refusal of the Court to suppress certain evidence seized by a state officer in an illegal search on the theory of the overruled "silver plat-

ter" doctrine; to the error in allowing the jury to see the reverse side of Abbrescia's fingerprint card, never admitted into evidence, but which contain information and data from which the jury might speculate adversely and prejudicially to the rights of Abbrescia to a fair trial; to the Court's failure to instruct upon the essential elements of all counts relating to the transportation of altered and forged checks; to the failure to charge the jury properly of the theory of individual liability as to those counts charging transportation of altered or forged checks.

Further, the defendant complains of not receiving a fair trial by virtue of the confusion which existed with respect to a wide variety of Exhibits which were renumbered, identified but not offered, offered but not identified, etc., even to the renumbering of Exhibits after the case was on appeal in the Appellate Court.

The Scheme.

The first 6 counts of the indictment charged generally a scheme to defraud and the use of the mails pursuant to such scheme by placing or causing to be placed in an authorized depository envelopes addressed to certain banks in Potomoc, Illinois (Count 1) in Midland, Michigan (Count 2), and in Villisca, Iowa (Count 6). Generally speaking, the scheme consisted of the operation of a tavern and cocktail lounge on West Madison Street in Chicago, known as the "Show Lounge". There was proof that Abbrescia as owner and Doran as manager would ply customers with drinks, cause their intoxication or take advantage of their intoxication, if they arrived already in that state, and cause the customers to sign certain checks. The defendants made it appear that the checks were torn up and that other checks were substituted therefor. Checks were raised in the amounts of $100 or $200 from checks

of $10, $15, $20 or $25; and some checks were alleged to have been forged. Some of the customers were brought to the tavern by cab drivers DiDomenico, LoCelso and Korbos. It was alleged that checks would then be deposited with the defendant Harris through the Lawndale Restaurant, and then to his bank, the Merchants National Bank; with defendant Schulman through his Ogden-Kedzie Currency Exchange, and then to the Exchange National Bank; and with defendant Grieco, through his 24 Hour Shopping Center and then through his bank, the Merchants National Bank.

Such generally was the mail fraud scheme, charged in Counts 1, 2 and 6.

As to the remaining counts, it was charged that the defendant transported in interstate commerce a falsely altered or forged security, to wit, a check.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals has so far sanctioned a departure from the procedure and standards appropriate for criminal trials in the federal courts as to call for an exercise of this court's supervision.

The Court of Appeals failed to hold that the recent cases of *Elkins* v. *United States*, 364 U.S. 206 and *Rios* v. *United States*, 364 U.S. 253 had any application to the facts here. The record shows that petitioner's co-defendant Doran was arrested by a state officer, placed under arrest and an illegal search ensued thereupon turning up a number of exhibits (A. 99). Certain exhibits were admitted into evidence over objections (A. 153).

Chicago police officer Tracy testified he made a vice investigation on the 2nd floor at a bar on Lake Street and after a conversation with two girls, paid them $25.00. He placed them and defendant Doran under arrest (A. 99). He searched the premises and found Exhibits 64, 164, 264, 364, 564, 47, 247, 347, 447, 547 and 747 (A. 99). Of these Exhibits 47, 247, 447, 64 and 264 were admitted into evidence over objections (A. 153).

Defendants moved for a mistrial on the ground that the witness testified to other crimes (A. 99). It was brought out by the witness that in the State proceedings which followed the arrest of Doran, he and the girls who were arrested were discharged following the suppression of evidence on the ground of illegal entry (A. 99). Whereupon the defendants again moved for a mistrial and called to the court's attention that there was a judicial ruling that the search and seizure by Tracy were illegal (A. 100). To

which objection the prosecutor stated the government's position:

> "If there was an illegal search, your Honor, it does not affect the evidence which is presented here, which is presented on behalf of the Federal government. Therefore, his motion does not apply to this evidence." (A. 100).

The trial court agreed with the government's attorney. Both were in error. *Elkins* v. *United States*, 364 U.S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437, and *Rios* v. *United States*, 364 U.S. 253, 4 L. ed. 2d 1688, 80 S. Ct. 1431. (Both cases decided June 27, 1960).

Elkins overruled the so-called "Silver Platter" doctrine upon which the government here relied. This Court held that evidence obtained by State officers during a search which, if conducted by federal officers, would have violated a defendant's immunity from unreasonable searches and seizures is inadmissible over the defendant's objection in a federal criminal trial. In *Rios*, this Court held that the evidence seized in an unreasonable search by State officers is to be excluded from a federal criminal trial upon the objection of the defendant, and that the District Court should consider whether the State officer obtained the evidence during a search which, if conducted by federal officers would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment. In the instant case, the trial court took no such action, even though it was pointed out that a State court had made a ruling determining that the arrest and search by officer Tracy was illegal and that in the State hearing the evidence was in fact, suppressed (A. 99-100).

Under *Elkins*, where there was a violation of Federal constitutional rights by the State officers in obtaining the evidence, as here, the trial court should not have permitted

Tracy's testimony, nor have permitted evidence about the exhibits nor have permitted their introduction. Under *Rios*, the court should have held a hearing outside the presence of the jury to determine whether Tracy's conduct, if engaged in by federal officers, would have amounted to a violation of the defendant's constitutional rights. The court did neither. Accordingly, it was error.

Notwithstanding the clear showing made in the record that the defendants objected to the introduction into evidence because of the illegal state search and notwithstanding that the trial court followed the government's contention that it made no difference whether there was an illegal search because the "silver platter" doctrine applied (A. 100), the Court of Appeals chose not to comment on the applicability of the two cases cited. The Appeals Court opined, "There was evidence seized in the brothel, and no showing that it was not seized in a search incidental to a lawful arrest. We show no error in its admission." (See Appendix).

It is clear from the record made in the trial court that the government was satisfied that even if there was an illegal search by state officers such evidence could be introduced in the federal case (A. 100). The trial court followed this argument of the government prosecutor and, therefore, ruled that the evidence was admissible under the old "silver platter" doctrine. Now that the *Elkins* and *Rios* cases forbid the introduction in a federal case of evidence which was admittedly obtained illegally by state officers, the Court of Appeals decided to rule against the petitioner's contention on the ground that there was no showing that the evidence was not seized in a search incidental to a lawful arrest. But the government witness, state officer Tracy, testified that in the state court proceedings the defendants were discharged following the

suppression of evidence on the ground of illegal entry (A. 99).

Defendant even moved for a mistrial (A. 99), which motion was denied.

It is plain that the Court of Appeals has misapprehended the necessity for the application of this court's rulings in *Elkins* and *Rios;* and under the circumstances this Court should grant the writ.

II.

In the Appellate Court the defendant complained he was deprived of a fair trial because certain notations which appeared on the back of his fingerprint card, Exhibit 961b, seriously prejudiced his right to a fair trial. What happened in the trial was that Exhibit 961a was offered and received (A. 153), which exhibit bore the fingerprints of your petitioner (A. 69). *The government did not tender into evidence 961b,* when it tendered 961a (A. 153). Accordingly, the defendant would have no opportunity to make known his objections to the damaging and prejudicial material appearing on the back of 961b.

Nonetheless, when 961a went to the jury, 961b was stapled to it as it appears in Exhibits, Vol. II, p. 53, front and back sides. For the Exhibit appears as it was delivered by government counsel to defense counsel for transmittal to Appellate Court.

Thus, without any sanction by *the court, the jury* was permitted to learn from Exhibit 961b that Abbrescia was "Wanted by the Bureau" which was stamped next to the print, "Federal Bureau of Investigation".

In addition, under the heading "Charge or Offense" there appears, "I T S P and Mail Fraud." Also, there

appears the legend, "Send Copy to—— copy of identification record to FBI, Chicago."

In very large letters there appears a stamped legend, "SEND COPY U. S. PROBATION OFFICE, 270 U. S. COURTHOUSE, CHICAGO, ILLINOIS."

Thus the jury was permitted to speculate that Abbrescia was wanted by the Federal Bureau of Investigation, that he not only was charged with mail fraud but with "I T S P" (Interstate transportation of stolen property? or what have you), and that he was somewhat involved with the probation office—either that he was on probation or that he was going to receive probation. But whatever speculation the jury made of the prejudicial data which appeared on Exhibit 961b, such speculation could only serve to convince the jury that they were dealing with a bad man; or that he was going to receive probation, thereby inducing the jury to believe that because leniency was in the offing, they should convict anyway. (The jury could not have been more mistaken; he had never been on probation and his sentence was ten years.)

The 7th Circuit stated in *United States* v. *Dressler*, 112 F. 2d 972, at 977:

> "The foregoing information was before the jury during their deliberations in the jury room without any instruction or direction by the court, and we are not free to conjecture that the members of the jury were conscious of any limitations or restrictions upon their use of it."

In the *Dressler* case, the government had sent to the jury an exhibit which carried the finger prints of the defendant. The backside of that exhibit carried the defendant's criminal history, about some of which the defendant had testified.

In the instant case, Abbrescia did not testify. The government had no right to give the jury an opportunity to speculate that Abbrescia was "Wanted by the Bureau" or that he was, somehow, involved with the United States Probation Department, or that he was charged with the crime of "U F S P". In fact, none of these things was even remotely true. The 7th Circuit stated, in *Dressler* (p. 977):

> "It is inconsistent with our traditional conception of a fair trial to permit any information to go to a jury which might influence the jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged."

On the basis of the Record, it is impossible to say that the jury was not substantially influenced by the information which was improperly before it.

In *United States* v. *Jacangelo*, 3 Cir., 281 F. 2d. 574, the Court reversed a conviction of conspiracy to transport forged money orders and of the substantive offenses of transportation. Notwithstanding that there seemed to have been sufficient evidence to convict the defendant the Court reversed solely on the ground that the government introduced evidence of involvements in other crimes. Such evidence came in the form of a confession by a co-defendant in which was described certain other crimes, such as that the defendant "was unwilling to cash the money orders himself because he was 'on probation' and 'on bail' ". To be noted is that the trial judge admonished the jury to consider the statement only against the co-defendant who had signed it. Notwithstanding, the reviewing court concluded that it was error to permit the entire statement to go to the jury, for (p. 576):

> "[Such] evidence of other crimes was intrinsically inadmissible and highly prejudicial as being informa-

> tion about collateral matters not connected with the offense charged. *Brown* v. *United States*, 3 Cir., 83 F. 2d 383; *Helton* v. *United States*, 5 Cir., 221 F. 2d 338 . . . To inform the jury of prior crimes of a defendant is, in the view of the Supreme Court, so improper and so prejudicial that a mistrial must be declared, even when the jurors assert that they can and will disregard that information. *Marshall* v. *United States*, 360 U.S. 310."

(And we note here that Abbrescia was never before convicted of any crime).

The Court of Appeals did not speak on whether the prejudicial material as here set out affected adversely defendant's right to a fair trial. Rather, the Appeals Court stated, "There is no ground for complaint about notations on exhibit 961b. Defendants stipulated with respect to it and had an opportunity to inspect it with other exhibits, and no objection was made to its going to the jury." (See Opinion, Appendix A).

But the Appeals Court ignored entirely the argument that the defendant had no opportunity to make known his objections, *because 961b was never offered into evidence*. In a footnote on the last page of the Opinion, the Appeals Court stated:

> "Exhibits 961a and 961b are photographs of the reverse side, stapled together, of a standard FBI fingerprint form. Notations on 961b included 'Charge or Offense * * * ITSP & Mail Fraud' 'Signed Copy U. S. Probation Office' and 'Wanted by Bureau' 961a was offered to prove Abbrescia's handling of fraudulent check. *961b was not offered.*" (Emphasis added).

It is clear that the Appeals Court recognized that 961b was not offered into evidence. What opportunity, then, did the defendant have properly to object to it, when it was neither offered nor received into evidence? Yet, through inadvertence or otherwise, the exhibit went to the jury.

The Court of Appeals does not state that the material was not prejudicial to the defendant: it could not in view of its own opinion in *United States v. Dressler*, 112 F. 2d 972 at 977. Instead, the Appeals Court ignored the contention of the petitioner.

The prejudice being so patent, the defendant was deprived of his right to a fair trial.

III.

The Court of Appeals denied the defendant his right to a review of the legal points raised before it. The Opinion of the court below entirely ignores the complaint that the prosecution confused the Record on the trial and further distorted it on review to the prejudice of the defendant's right to a fair trial.

The Brief to the Court of Appeals of co-defendant Grieco on this point was adopted by the instant defendant. An entire argument was made to the Appeals Court that the Record in the trial was so confused with respect to the numbering of exhibits and that the record was even distorted on review that no defendant could have had a fair trial. Yet, the Appeals Court evaded speaking on this claimed error at all. That the error is important as prejudicial to the defendant is demonstrated as follows:

> " . . . the record is not meaningful in the absence of complete clarification as to the exhibits." (Government affidavit filed in the Appellate Court in this case).

• • •

This case is a document case. All the testimony related to documents and was adduced to explain them.

Lest your Honors become confused by the 150 odd documentary exhibits admitted and by the several hundred identified, we would offer that clarification so avidly sought by the prosecution in this case.

An exhibit numbered 36 caused some problems that needed solving according to the government (A. 97) because count 36 (A. 37) charged on an instrument dated four months *after* the indictment was returned, and Exhibit 36 was dated two years *before* its return. When the defense claimed a variance the prosecutor "solved the problem", as he put it, by calling Exhibit 236 Exhibit 36 while Exhibit 36, previously Exhibit 229 was called Exhibit 236 (A. 97).

Exhibit 61 was identified as a bank signature card (A. 46) and the needed clarification is provided by pointing out that in fact it is a check.

Exhibit 1002 and Exhibit 1202 likewise create no problems, owing to the fact that they are both the same exhibit, sailing under two flags (A. 49).

Exhibit 1501B was not identified by any witness, so it was merely offered and received into evidence (A. 153, 157), while Exhibit 1501A, while not offered, enjoyed the distinction of being identified (A. 69).

Exhibits 961A and 961B were identified. Exhibit 961A was offered and received and went to the jury (A. 153, 160) and 961B went to the jury without bothering to get itself offered or received.

Exhibit 176 was offered and received into evidence (A. 161), but was not among the exhibits filed here after this case was docketed. So the government returned to the trial court to change the record in order that where "176" appeared in the record "167" should appear instead (A. 181). In a motion filed in the Appellate Court, the government said it had procured the change so the record would conform to the actual District Court proceedings. The judge said when he made the change that

the court reporter had not made a mistake in taking down the numbers during the trial (A. 183).

When the government returned to the trial court, to make the record un-conform to what the admittedly accurate court reporter's transcript said happened at the trial, it moved that reference to Exhibit 334 be stricken from the record (A. 180) having previously stated to the Appellate Court by motion that its records showed that if the exhibit existed, it was an advice of a check refund, was never identified, and was offered into evidence by mistake. Once back in the trial court, the government fortunately "found" the check refund exhibit (A. 182) which had been offered by mistake and was never in the record anyway and didn't exist and besides is a roll of microfilm filed in the Appellate Court.

The prosecutor found something wrong in the numbering of Exhibits 133 and 133a. So he changed them to 330 and 530 respectively to "apply to" Count 30 as the prosecutor put it. If they applied, they applied to count 29. Witness Lawler said he did not sign count Exhibit 29 but it cleared his bank (A. 89). Witness Myhre complained that Exhibit 29 didn't bear his signature either and it cleared *his* bank too (A. 60). Exhibits 133 and 133a have Lawler's name on them. That is, some of them do. On the other hand, Exhibits 133 and 133a have Mark Little's name on them, and not Lawler's. That is why the prosecutor made the change he did not make to 330 and 530 "to apply to Count 30". They have so little to do with Count 30. Like the jury, the Appellate Court had before it, two exhibits marked 133 and two exhibits marked 133a. Also Exhibit 29, possibly the only universally denounced forgery that your Honors will ever see that was honored by two banks, fifteen hundred miles apart, within a period of a week, over the protests of two depositors with con-

pletely dissimilar names. Government did not want the Appellate Court to be confused, just as it did not want the jury to remain confused after its verdict. So the government returned to the trial court *after the case was docketed* in the Appellate Court and persuaded the trial judge to change Exhibit 133a to 133-a-1.

We trust that the Court is now attuned to that "complete clarification as to Exhibits" deemed requisite by the government for the record to be "meaningful". For our own part, the more it is explained, the more we don't understand.

• • •

Our complaint is not academic.

Exhibit numbers were changed after witnesses had identified them, and before still others had discussed them,—all by number. No juror could possibly understand clearly that today's witness was discussing a totally different document from that described by yesterday's witness.

That the error was harmful is further evidenced by the conviction under Count 33. No interstate transportation was proved, yet Exhibit 133a, unrelated to Count 33, suggests interstate transportation of a check. Under the numbering "system" employed (last two digits identify the related Count) the jury was sure to believe that 133a supplied the missing element of proof.

In short, it became impossible for the jury to know what had been proved, and what had not. If the prosecutor, for example, could convince the trial judge that he had proven that first endorsements on dozens of checks were fictitious (A. 159) when in fact he had not introduced evidence of one such endorsement, it follows that the less experienced jury was similarly susceptible.

The confusion generated by the exhibit-juggling still infects the record. It necessitated a recent application to the trial court for changes in the transcript—not to correct the record, but to improve on it. (A. 183). A trial procedure whose proponent is unwilling to expose it to review without alteration, is unjustifiable. And the right to review necessarily entails the right to bring before the reviewing tribunal an accurate account of the proceedings below.

There is a dearth of decisions on this point occasioned probably by the rarity of its occurrence. However, either this Court should grant certiorari and rule on this question or should send the case back to the Court of Appeals with instructions to render its opinion on this point.

IV.

The Appeals Court denied the defendant his right to review by failing to render its opinion on the defendant's claimed error that the trial court failed to instruct the jury as to the essential elements of the crime charged in Counts 8 through 40. As to those counts, the defendant was found guilty of counts 9, 10, 18, 19, 20, 33, 39 and 40. In the first six counts the petitioner was charged with using the mails in pursuance of a scheme to defraud in violation of Section 1314, title 18, U.S. Code (A. 11-21). In the remaining counts (A. 22-39) in which he was found guilty, the petitioner was charged with the interstate transportation of falsely altered or forged securities in violation of Section 2314 of Title 18.

Neither of these statutes is complete in itself. The court undertook to instruct the jury at length as to the essential elements of the mail fraud statute relating to Counts 1, 2 and 6 (A. 167-169).

But there were no such comparable instructions given on the remaining 29 counts. Section 2314 denounces the interstate transportation of "any falsely made, forged, altered or counterfeited securities". Obviously, resort must be had to other statutes if one is to determine what is meant by "falsely made", "forged", "altered", "counterfeited", or for that matter, "security".

The court apparently recognized an area of legitimate concern lest the jury should not realize that a check is a security. The jury were, accordingly, instructed that the term "security" included checks (A. 172).

But how was the jury to know what was meant by false making forgery or false alteration?

The Court had an affirmative obligation to inform the jury concerning the elements comprising the offense whereof defendants stood charged. This obligation is absolute, and cannot be excused by reason of any defense failure to request a charge or to object to the charge as given. *United States* v. *Levy*, 3 Cir. 153 F. 2d 995, 999; *Morris* v. *United States*, 9 Cir. 156 F. 2d 525, 527; *Screws* v *United States*, 325 U.S. 91, 107. As observed in *Morris*, *supra*:

> "In a criminal case, it is always the duty of the court to instruct on all essential questions of law, whether requested or not (p. 527) . . . The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged." (p. 529).

And in *Levy*, the court termed it:

> " . . . error of the highest degree to submit the case to the jury without adequate instructions as to the law allegedly violated by the defendant on trial." (p. 999).

But in considering the interstate transportation counts, the jury here were left to determine for themselves all of the following questions:

(a) What is a falsely made security?

(b) What is a forgery?

(c) What is an "altered security?"

The court's failure to define these terms for the jury, was fatal error within the evidentiary context of this case.

One reason why the error was so highly prejudicial in this case, is that the government sought to prove that every count check was "falsely made" as a layman might use that term, through evidence which does not establish that the checks were "falsely made" in the statutory sense.

For the count checks were "made" by the victims, according to the government's theory, because the victims were "falsely" informed that the checks were intended as substitutes for others which had been torn up. A juror would have been justified in believing, under the court's instruction, that such a check was "falsely made." A juror might well also have believed that merely inducing a man to make a check while intoxicated, necessarily stamped the result a "falsely made" check.

But that is simply not what the statute means. A "falsely made" check is *not* one which has been obtained by false representations, or by overreaching the maker. A document is "falsely made", within the meaning of this Section, only if the document is actually something other than what it purports on its face to be—in short, "falsely made" is virtually synonymous with "forged." *Martenet v. United States*, 10 Cir. 1954, 216 F. 2d 760, 763.

Of course, the statute also denounces the interstate transportation of checks obtained by the type of fraud that the government attempted to prove. But the transportation of such *fraudulently obtained* checks is criminal under this section only if the value thereof exceeds $5,000.00. Sec. 2314, Title 18, U.S.C. The $5,000.00 valuation is, in those circumstances, essential and jurisdictional. *Stern* v. *United States*, 6 Cir., 204 F. 2d 647, 649; *Abbott* v. *United States*, 5 Cir., 239 F. 2d 310, 312, *United States* v. *Gordon*, 7 Cir., 253 F. 2d 177, 180; *United States* v. *Pearce*, 7 Cir., 275 F. 2d 318, 324. The jury was not instructed on any such theory, and the indictment did not charge that offense. In fact, the total of *all* of the proved count checks is less than $5,000.00.

The simple fact is that a fraudulently obtained check is not a "falsely made" check within the meaning of this Statute. It was therefore indispensible that the jury be told that the government's principal contention as to "falsity" was not "falsity" within the meaning of the Statute, however illogical that proposition might seem to a lay juror.

To illustrate the hardship imposed by this situation, we direct your Honors' attention to the government's theory that the first endorsements on the reverse of the checks were that of fictitious persons (A. 15, 159). While there was no evidence on the point, if in fact the jury believed the government's assertions, how were they to know that a fictitious endorsement does not taint a check as a forgery?

Further, how was the jury to know that a check signed by someone other than the intended maker, but with the authorization of the intended maker, was not a forgery? There was direct evidence of such a situation in the case of the witness Bynum, affective of Counts 39 and 40 (A. 85). All the other counts involving forgeries ought prop-

erly to have required as a prerequisite of guilt, a determination by the jury that the signatures were not authorized by the purported maker; and this cannot have been a routine inquiry in view of the intoxicated condition of the witnesses involved. But the jury was instead left free to speculate that any instrument which does not bear the genuine signature of the purported maker, is necessarily a forgery. This cannot but have simplified their deliberations, as, indeed, must be the case wherever the jury is left free to determine guilt without reference to the underlying legal principles.

As to so-called altered securities, the jury was not apprised that the alteration must be unauthorized; that it must be material; and that it must appear upon the face of the instrument itself. The jury also could not possibly have understood that the appearance of a fictitious first endorsement on an instrument payable to "cash" is neither a forgery nor an alteration so far as this case was concerned.

There is no question that the requirement of instructing the jury as to the elements of the offense, may be satisfied by a reading of the statute if that statute is itself sufficiently clear that no explanation is required. But if the statute be such as to require legal determination as to the meaning of the words therein used, a reading of the statute will not suffice. *United States* v. *Gordon*, 3 Cir., 242 F. 2d 122, 126, said that if an instruction failed to define the offense charged the case must be reversed.

And Section 2314, Title 18 does not define the primary offenses, such as "false making", or "forgery," to which it refers. *Rowley* v. *United States*, 8 Cir., 191 F. 2d 947, 950. It necessarily follows that a mere reading of the statute cannot possibly inform the jury of the elements of the offense.

The State of Illinois defines a forgery in a paragraph of some 500 words. Illinois Revised Statutes, 1959, Chapter 38, Section 277. Notwithstanding this, the cases are legion wherein the Illinois courts have been called upon to determine what is and is not a forgery under that statute. To claim that the jury could determine, on the facts and circumstances of this case, whether any count document was a forged or altered security, is sheer sophistry.

Clearly, as to the interstate transportation counts, there was a total failure to advise the jury of the essential elements of the offense charged. It is settled law that conviction on those counts must, therefore, be reversed.

As it was said in *Screws* v. *United States*, 325 U.S. 91, 107 the failure to instruct on essential elements is error.

> " . . . so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest . . . "

And this is an error which is all the more calamitous in view of the large number of purely State offenses alluded to by the prosecution. Such error called for the Appellate Court's reversal—or at least consideration of discussion.

As to this claimed error the Appeals Court failed at all to render its opinion; and, therefore, the defendant was effectively denied his right to have his case reviewed.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES,
Attorney for Petitioner

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

No. 13094 SEPTEMBER TERM, 1961 JANUARY SESSION, 1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DAVID DORAN, DOMINICK ABBRESCIA, JULIUS GRIECO, and JOSEPH A. LOCELSO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 11, 1962

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* The defendants Abbrescia, Doran, and Grieco have appealed from judgments on verdicts finding them guilty of conspiracy to use the mails in a scheme to defraud[1] and of unlawfully causing the trans-

[1] 18 U.S.C. §1341 Frauds and swindles. Whoever, having devised or intending to devise any scheme * * * to defraud, or for obtaining money * * * by means of false or fraudulent pretenses, representations, * * * or procure for unlawful use any counterfeit or spurious * * * security * * *, for the purpose of executing such scheme * * * or attempting so to do, places in any * * * authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department * * * or knowingly causes to be delivered by mail according to the direction thereon * * * any such matter or thing shall be fined not more than $1,000 or imprisoned not more than five years, or both.

portation in interstate commerce of forged or falsely altered securities.[2] LoCelso appeals from the judgmen on the verdict finding him guilty of the conspiracy. Abbrescia was sentenced to prison for ten years, Doran for twenty-five years, Grieco for fifteen years, and LoCelso for two years.

There is ample proof of the unlawful scheme in detail: Cab drivers would seek out nightlife-bound visitors in Chicago and drive them to the Show Lounge. There they would be drawn into the net of an unlawful scheme by companionable female employees of the Lounge. The unlawful aim of these companions was to exhaust the cash reserves of the victims and aid in inducing, as quickly as possible, drunkenness by means of frequent or spiked drinks. Once out of cash, the victims were induced to sign checks already "made." Once written, the checks were used as models for tracing forged copies. The copies were then used in various ruses to induce the writing of additional or substitute checks. First endorsements were generally fictitious to give the appearance of genuineness and to conceal the culprits. The checks were negotiated to persons like Grieco, and institutions like the 24 hour Shopping Center, having bank accounts. The checks were deposited in the accounts and thus placed in channels which led to the mails and eventually to the drawee banks in Illinois and other states.

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[2] 18 U.S.C. §2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.

* * *

Whoever with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited: * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Lotelso was a cab driver; Grieco owner of the 24 hour Shopping Center, whose bank account and his own were at the Merchants National Bank in Chicago; Abbrescia was manager of the Lounge and Doran his assistant.[2] They were convicted under the conspiracy Counts One, Two, and Six. None of them testified at the trial.

Abbrescia and Grieco were sentenced to five years, and Lotelso to two years, on each count, the sentences to run concurrently. Doran was sentenced to five years on each count, the sentences to be served consecutively.

The defendants claim that the evidence does not support the jury's verdicts as to these counts.

The first question is, therefore, whether there is substantial evidence, taking the view most favorable to the Government, to support the verdicts. *Glasser* v. *United States*, 315 U.S. 60, 80 (1941); *United States* v. *Marog*, 7 Cir., 248 F. 2d 663, 665, cert. denied, 355 U.S. 931 (1957).

The evidence and inferences favorable to the Government, *United States* v. *Green*, 7 Cir., 246 F. 2d 155, 157, cert. denied, 355 U.S. 871 (1957), in proof of defendants' participation in the conspiracy are: Lotelso was one of the cab drivers who brought victims to the Show Lounge. He shared in the division of a percentage of the proceeds of the unlawful conspiracy. He would "half drag and half stagger" the victims to a cab for return to their hotel or "some place." He drove victim McDonald to the Show Lounge, presented him to Abbrescia, and McDonald was defrauded. He also drove victim Stehl to the,

[2] Defendants Harris and Schulman have not appealed; DiDomenico died pending trial, and Korlos was dismissed before trial.

Lounge and later to a brothel. He received a "gratuity" from Siehl of a $350 check which he deposited with a cab company credit union and later withdrew.

Also: Grieco owned the 24-hour Shopping Center and the Show Lounge. The first fraudulent check taken was of victim Bardin, dated September 21, 1956, drawn on a North Carolina bank. It was endorsed by Shopping Center and deposited in its account with Merchants National Bank of Chicago, where Grieco also had his personal account No. 20284. The check was not paid by the drawee and was returned "Payment Refused Amount Altered." Merchants National debited Shopping Center's account accordingly and notified it of the dishonor of the Bardin check.

And: Subsequently, victim Wyman's check, dated December 4, 1956, subject of Count One, was taken. It was "made" in printing similar to Doran's and drawn against the Goodwine State Bank of Potomac, Illinois. It bears the endorsements "Jack Johnson; Shopping Center; J. Grieco, 2946 W. Madison; Merchants." Grieco wrote his endorsement. The check was received by the Goodwine Bank and returned dishonored. It had not been put through a "bad check" detecting device that Shopping Center had had installed which photographs checks and presenters of checks. The device was installed under a contract indemnifying Shopping Center against loss from "bad checks." The contract required all Shopping Center's checks to be processed.

The jury could reasonably conclude from the evidence and inferences in the record that Abbrescia and LoCelso were members of the unlawful scheme of which Wyman was a victim; and that Doran "made" the fraudulent Wyman check and that the first endorser was fictitious.

Once shown to be a part of the conspiracy, Grieco is responsible "for all that may be or has been done." *Poliafico* v. *United States*, 6 Cir., 237 F. 2d 97, 104, cert. denied, 352 U.S. 1025 (1956). His participation need not have been shown by direct evidence. *Ibid.* Since a check drawn on a New Jersey bank was returned dishonored in eighteen days, the jury could reasonably infer that the Bardin check was returned from the North Carolina bank, and Shopping Center notified, within the eighty-one days before the Wyman check was written. And it could conclude that Grieco, as owner of the Shopping Center, knew of notice of the returned Bardin check and with that guilty knowledge endorsed the Wyman check.

Venue was proved with respect to the Wyman check. It was made in Chicago, deposited in a conspirator's account in Chicago, mailed in Chicago and returned in the mail to Chicago. There was proof of defendants' mailing the check. Evidence of the ordinary course of banking business and Post Office Department customs was substantial proof of the mailing. *Decker* v. *United States*, 4 Cir., 140 F. 2d 378, 379, cert. denied, 321 U.S. 792 (1944), and Grieco's business experience and consequent knowledge of ordinary banking practice was enough to show he caused the mailing. *United States* v. *Sheridan*, 329 U.S. 379, 391 (1946).

The verdict was justified on Count One. Because their sentences on Counts One, Two and Six are concurrent and the verdict against Abbrescia, Grieco and LoCelso is justified on Count One, we need not consider the other two counts against them. *Lawn* v. *United States*, 355 U.S. 339, 359 (1958); *Roviaro* v. *United States*, 353 U.S. 53, 59 n. 6 (1956); *United States* v. *Sheridan*, 329 U.S. 379, 381 (1946).

Count Two involved a check of H. L. Smith. There was comparative evidence from which the jury could find that Doran, who wrote the victim Bynum's check (subject of Count Thirty-nine), also wrote the Smith check. Count Six involved a copy of a collection form representing a check of victim Garland, drawn by the "manager" of the Lounge. There was evidence that the check involved in this count was presented by Doran to a currency exchange for collection, that at the time she represented that it was from the Lounge, and expected the concealment of this fact. We conclude that the evidence and inferences support the verdicts against Doran on Counts Two and Six as well as on Count One.

Abbrescia, Doran and Grieco were each convicted on substantive Counts Thirty-nine and Forty. Grieco was sentenced to ten years' imprisonment, Abbrescia to five years, and Doran to ten years, on each count, the sentences to run concurrently.

Count Thirty-nine charges Abbrescia, Doran and Grieco caused a falsely altered check of victim Bynum to be transported in interstate commerce with fraudulent intent, knowing it to have been falsely altered.

Bynum testified that he signed a check on the First National Bank of Hudson, Ohio for $25.00 and that it had been raised to $125.00. There was some contrariety in this witness's testimony with respect to the details of what transpired the night the check was signed. This is understandable in light of the testimony of the scheme. We think, however, there is sufficient evidence, including the check itself, to show that the check was falsely altered.

There is evidence from which the jury could reasonably infer that Doran printed the Bynum check, Exhibit 39. It bears the endorsements "Dominick Abbrescia" and "J.

Grieco 20284." It also bears the endorsements of the Merchants National Bank and Federal Reserve Bank of Chicago. There is evidence of fingerprints and comparisons of handwriting from which the jury could reasonably infer that Abbrescia wrote his endorsement, and from comparison of handwriting that Grieco wrote his. There is evidence from which the jury could reasonably infer that Abbrescia, Doran and Grieco caused the check to be transported from Chicago, Illinois to Hudson, Ohio.

This substantial evidence supports their convictions on Count Thirty-nine. We need not, therefore, consider Count Forty, since the sentences are concurrent. *Lawn* v. *United States*, 355 U.S. 339, 359 (1958); *Rogers* v. *United States*, 350 U.S. 53, 59 n. 6 (1956); *United States* v. *Sheridan*, 329 U.S. 379, 381 (1946).

This evidence does not include statements of Grieco's co-conspirators and his conviction does not offend the rules in *Krulewitch* v. *United States*, 336 U.S. 440 (1950). He was charged as a principal in Count Thirty-nine. The jury could reasonably have inferred that Grieco, when he endorsed the Bynum check, knew it was falsely altered, would be put in the mail and be forwarded by Merchants National Bank in interstate commerce to the drawee bank. These would be sufficient to support the finding that he "caused" the mailing, *United States* v. *Sheridan*, 329 U.S. 379, 391 (1946), citing *Kann* v. *United States*, 323 U.S. 88, 93 (1944), and was a principal in the unlawful enterprise.

No error was committed in the giving of instructions. The facts here are different from those in *Pinkerton* v. *United States*, 328 U.S. 640 (1946) and the instruction there is inapplicable here. Grieco was indicted in Count Thirty-nine as principal. And although the trial court here omitted the word "altered" at one place in reading the

definition of the offense in Count Thirty-nine, other instructions explained the offense and prevented error.

We find no merit in the contention that Abbrescia and Doran were denied a fair trial. The testimony that Doran was arrested in a brothel was neutralized by the abundance of kindred testimony. There was evidence seized in the brothel, and no showing that it was not seized in a search incidental to a lawful arrest. We see no error in its admission.

There is no ground for complaint about notations on Exhibit 961b.[4] Defendants stipulated with respect to it and had an opportunity to inspect it with other exhibits, and no objection was made to its going to the jury.

We have discussed the points that need consideration. No prejudicial error is shown. There is substantial evidence to support the verdicts of guilty on conspiracy Counts One, Two, Six, and substantive Count Thirty-nine.

For the reasons given, the judgment is AFFIRMED.

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[4] Exhibits 961a and 961b are photographs of the reverse sides, stapled together, of a standard FBI fingerprint form. Notations on 961b included "Charge or Offense * * * ITSP & Mail Fraud," "Send Copy U. S. Probation Office," and "Wanted by Bureau." 961a was offered to prove Abbrescia's handling of fraudulent checks. 961b was not offered.

APPENDIX B.

United States Court of Appeals
For the Seventh Circuit

Chicago 10, Illinois

Thursday, January 11, 1962

BEFORE

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. WIN G. KNOCH, *Circuit Judge*
HON. ROBERT J. KILEY, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DAVID DORAN, DOMINICK ABBRESCIA, JULIUS GRIECO, and JOSEPH A. LOCELSO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 13094 SEPTEMBER TERM, 1961 JANUARY SESSION, 1962

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C.

Constitutional provisions and statutes involved, Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> " . . . no state shall . . . deprive any person of life, liberty, or property without due process of law; . . . "

Section 1314, Title 18, United States Code, provides in pertinent part:

> "Whoever, having devised . . . any scheme . . . to defraud . . . for the purpose of executing such scheme . . . places in any Post Office or any depository for mail, any matter or thing whatever to be sent or delivered by the Post Office Department . . . or knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than 5 years, or both."

Section 2314, Title 18, United States Code provides in pertinent part as follows:

> "Whoever transports in interstate . . . commerce any . . . securities . . . of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> "Whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsly made, forged, altered, or counterfeited . . . .
>
> "Shall be fined not more than $10,000.00 or imprisoned not more than 10 years or both."